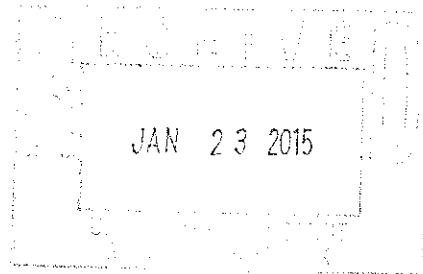


Alan Moss
P.O. Box 721
Moss Beach CA 94038

January 22, 2015

TO: Clerk of the Court
U.S. Bankruptcy Court for the Southern District of New York
Alexander Hamilton Custom House
One Bowling Green
New York New York 10004-1408

Re: ResCap
Case No. 12-12020



ENCLOSED (3):

1. **RESPONSE IN OPPOSITION TO RESCAP BORROWER CLAIMS TRUST'S SEVENTY-FIFTH OMNIBUS OBJECTIONS TO CLAIMS**
2. **DECLARATION OF ALAN MOSS IN SUPPORT OF HIS RESPONSE IN OPPOSITION TO RESCAP BORROWER CLAIMS TRUST'S SEVENTY-FIFTH OMNIBUS OBJECTIONS TO CLAIMS**
3. **PROOF OF SERVICE**

REQUESTED ACTION:



File original(s) and return file stamped copy in enclosed envelope.

Stamped, self-addressed envelope enclosed.

Very truly yours,

Alan Moss

1 Alan Moss
P.O. Box 721
2 Moss Beach CA 94038
Telephone: (415)494-8314
3 Facsimile: (650)728-0738

4 *Attorney In Propria Personum*

5
6
7
8 IN THE UNITED STATES BANKRUPTCY COURT
9 FOR THE SOUTHERN DISTRICT OF NEW YORK
10 MANHATTAN DIVISION

11
12 IN RE:

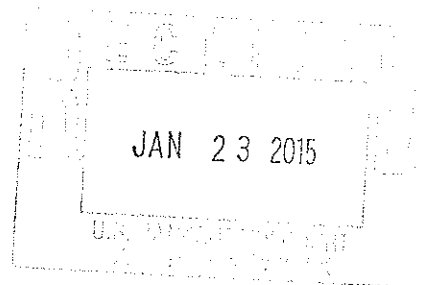
13
14
15 RESIDENTIAL CAPITAL, LLC, *ET*
16 *AL.*

17 Debtors.)
18 _____

) BANKRUPTCY CASE NO. 12-12020-MG
) CHAPTER 11

) Jointly Administered
) (Executive Trustee Services, Case No. 12-
14 12028)

) **RESPONSE IN OPPOSITION TO RESCAP**
) **BORROWER CLAIMS TRUST'S SUPPLEMEN-**
) **TAL OBJECTION AND REPLY RE: SEVENTY-**
) **FIFTH OMNIBUS OBJECTION TO CLAIMS**
) [Claim No. 4445]
) Hearing Date: February 11, 2015
) Hearing Time: 10:00 A.M.



OPPOSITION OF ALAN MOSS [CLAIM NO. 4445]
TO DEBTOR'S SEVENTY-FIFTH OMNIBUS OBJEC-
TION TO CLAIMS

BANKRUPTCY ACTION NO. 12-12020-MG

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1 Claimant, **ALAN MOSS**, otherwise identified in the Notice to this motion,
2 dated September 17, 2014, as Claim No. 4445, hereby opposes the debtor's Supplemental
3 Objection And Reply re: Seventy-Fifth Omnibus Objection as it applies to him.¹

4 The debtor misunderstands the nature and basis of this claim, as well as funda-
5 mentally misunderstanding California law, under which it arises. This claim arose in, and
6 resides in, California. Debtor's objection to this claim is without legal authority and justi-
7 fication.

8 In its first iteration, Debtor's objection to this claim, which was filed four
9 months ago on September 17, 2014 as Doc 7552-1, was based on what debtor entitled "lack
10 of standing."² Claimant's response to that objection caused Debtor to withdraw its objection
11 and re-schedule the hearing as to the undersigned. The Debtor now files this supplemental
12 objection.^{3, 4} The supplemental objection of ResCap fares no better than the original.

13 **I.**

14 **FACTS RELEVANT TO THIS MOTION**

15 The facts set forth in Claimant's brief, together with the supporting Declaration
16 of Alan Moss, filed October 16, 2014 as Doc 7667, at P. 3-4, are hereby incorporated by re-

17
18 ¹ The actual debtor is an entity named **Executive Trustee Services**("ETS"), a wholly-owned
19 subsidiary of ResCap, whose bankruptcy filing is denoted as Action No. 12-12028. ETS was made a part
of this action, Action No. 12-12020, when this action became jointly administered.

20 ² See Doc 7552-1, filed September 17, 2014. Debtor evidently believes, and so argues(from its
21 asserted "diligent review of all the files"), that the basis of this claim is essentially a wrongful foreclosure
claim. From that, the debtor argues that the claim is fallacious. In taking such an untenable position, debtor
22 ignores the years of litigation involved in this matter, and essentially sweeps it away in but a few sentences.
Even a cursory review of the relevant documents, attached to the Moss Declaration previously filed,
23 demonstrates that is not the case. Rather, this claim is founded on the *negligence* of debtor's
subsidiary ETS, pursuant to California law. It is not based on wrongful foreclosure.

24 ³ See Doc 7904, filed December 19,2014.

25 ⁴ See Doc 7724, filed November 7, 2014, and Doc 7829 filed December 5, 2014.

1 ference as though fully set forth herein.

2 Claimant initiated litigation with the holder of his deed of trust(akin to, but dif-
3 ferent than, a mortgage) in July 2009. The purpose of that litigation was to undue the fore-
4 closure sale of his home of thirty years, a sale which only occurred because the debtor herein,
5 Executive Trustee Services, hereinafter "ETS", the alleged trustee at the time, illegally issued
6 statutorily-required notices and conducted the sale of claimant's home, all at a time when
7 ETS was unlawfully appointed to that position. As explained *infra*, ETS was made the trus-
8 tee by an entity who, at that time, did not have a beneficial interest in the deed of trust, and
9 wouldn't acquire such interest for at least a year; under California law, having a beneficial
10 interest in the deed of trust was a prerequisite to being able to substitute in a new trustee.

11 Further, the undersigned had a written agreement to cancel the scheduled fore-
12 closure sale, which ETS totally ignored, and without notice to the undersigned, conducted
13 the sale and sold the undersigned's home(to the then holder of the deed of trust).

14 Of particular note is that both of these facts(the trustee's lack of authority and
15 the cancellation of the scheduled sale), admitted to by debtor in its current papers, were
16 fought over for more than three years in the litigation that Claimant was forced to initiate in
17 an attempt to try to undo this.⁵

18
19 ⁵ It is interesting to note that debtor relies on, and submits to this Court, the Supplemental
20 Declaration of Deanna Horst, who states in her Declaration that she has worked for ResCap since 2001, and
21 is familiar with how ResCap did business, thus qualifying her to make this Declaration. That evidently
22 means that she was one of individuals that presided over the shenanigans that ResCap committed during the
23 financial crisis, including robo-signing and the like. For example, "Order Granting Defendants' Motion For
24 Sanctions", issued by Circuit Judge Bernard Nachman, Circuit Court of the Fourth Judicial District, In and
25 For Duval County, Florida, in the case of *TCIF, REO2, LLC vs. Martin L. Leibowitz*, as trustee, Case NO.
16-2004-CA-4835-XXXX-MA" regarding the actions of Margie Kwiatkowski, who was identified as an
26 officer of GMAC Mortgage. This was based on her deposition testimony that she was "robo-signing"
documents and that her signature was being notarized at a time different than when she signed the document.
See deposition of Margie Kwiatkowski at P. 28:17-30:8. This very individual signed two documents in this
instant matter: in which she purports to substitute a new trustee on behalf of an entity called TCIF REO2,
LLC, and in which she purports to assign the property from TCIF to defendant herein.

1 The litigation was enormously time-consuming and emotionally overwhelming
2 throughout its nearly four years. Claimant had to represent himself in this litigation because
3 of the huge cost and time-consumption that was necessitated by the actions of ResCap.
4 Claimant had to withstand the onslaught of a major law firm throwing every imaginable trick
5 at him, sparing no expense, all the while facing the very real threat that he could be ousted
6 from his home. At no time throughout this nearly four years of litigation was it ever admitted
7 that the trustee was illegally appointed. This malicious activity is now characterized by the
8 debtor as essentially meaningless and of little import to Claimant, the debtor taking the po-
9 sition that no reasonable person would be emotionally affected by it.

10 During the course of this litigation, the Claimant discovered that a cause of ac-
11 tion existed under California law against ETS for its actions as part of the scheme to wrest
12 Claimant's home from him. Therefore, another lawsuit was filed against ETS; ETS failed
13 to appear, and Claimant took its default.⁶ In California, a second hearing is required to
14 enable a judge to determine damages and enter judgment. A day before that hearing, ETS,
15 as part of ResCap, filed for bankruptcy protection, thus staying that action.

16 This claim is based on the very same request for damages which was set to be
17 heard by the Court in San Mateo County, California the day after this bankruptcy was filed.

18 II.

19 ARGUMENT

20 A. DEBTOR MISUNDERSTANDS CALIFORNIA'S DEFAULT PROCEDURE AND ITS EFFECT

21 1. Because Default Was Duly Entered Against Debtor In California, The 22 Causes of Action In The ETS Complaint Have Been Conclusively Proven.

23 Debtor argues, at P. 7-8, ¶¶22-23 of its supplemental objection, that the default
24 that Claimant obtained against debtor ETS is of little note and has no conclusive effect on

25 ⁶ See Declaration of Alan Moss filed herewith, at Exhibit 1.

1 Claimant's claim. From this proposition, Debtor argues that Claimant cannot prove, to the
2 satisfaction of this Court, the factors necessary to prove negligence; nor is Claimant able to
3 prove his other causes of action for (1) negligence *per se*, (2) fraud, (3) negligent infliction
4 of emotional distress and (4) intentional infliction of emotional distress.

5 Debtor misunderstands California procedure. Accurately stated, the default
6 does have conclusive effect as to the merits and bases of the *claims* (i.e., *the individual causes*
7 *of action*) against ETS in the California Superior Court action⁷; the default does not have
8 conclusive effect on the *amount of damages* being claimed, which has to be determined by
9 a judge in a "prove-up" hearing.⁸

10 As set forth in claimant's earlier brief(D0c 7667), California's default proce-
11 dure is bifurcated: the first step is to obtain a default. Once the clerk enters the default in the
12 Court rolls, "entry of default" as it is called in California, the defendant is deemed to have
13 admitted to the material allegations of the complaint.⁹ *Vasey vs. California Dance Co., Inc.*
14 (1977) 70 Cal.App.3rd 742; *Molen vs. Friedman* (1998) 64 Cal.App.4th 1149.

15 Moreover, the defaulting party is "out of court" and thereafter has no right to
16 appear in and participate in the proceedings(unless and until the default is set aside, or alter-
17 natively, a default judgment is entered, at which point the defaulted party may appeal that
18 judgment. *Devlin vs. Kearny Mesa AMC/Jeep/Renault, Inc.*(1984) 155 Cal.App.3rd 381. En-
19 try of default ousts the court of jurisdiction to consider any motion other than a motion for
20 relief from default. *People vs. One 1986 Toyota Pickup* (1995) 31 Cal.App.4th 254; *W.A.*

22 ⁷ The Complaint in *Moss vs. ETS* is Exhibit 1 to the Declaration of Alan Moss, filed as Doc
23 7667 on October 16, 2014.

24 ⁸ The prove-up hearing had been scheduled by the Court, but was not heard because of the filing of
25 this bankruptcy.

26 ⁹ See Moss Declaration, Exhibit 1. Default was entered on June 17, 2011.

1 *Rose Co. vs. Municipal Court(Fitzsimmons).* (1959) 176 Cal.App.2nd 67.¹⁰

2
3 The default was duly entered by the Court on June 17, 2011. *See* Exhibit 1 to
4 the Declaration of Alan Moss filed herewith.

5 ETS filed a motion to set aside the default, but withdrew it voluntarily when
6 it was pointed out to them that it was without any legal basis. ETS then filed a second mo-
7 tion to set aside the default on different grounds, also meritless, but the bankruptcy inter-
8 vened.

9 Claimant herein caused default to be duly entered on June 17, 2011.¹¹ As can
10 be seen from the docket sheet in *Moss vs. ETS*, the debtor did not move to set aside the de-
11 fault for nine months.¹² In fact, the default in this case is still in effect. At that time, there
12 was pending claimant's request for entry of default judgment, where a dollar figure would
13 have been determined by a judge as an actual judgment. The moving papers had already
14 been filed. That motion was not heard because of the automatic stay resulting from the filing
15 of this bankruptcy(notice of which the debtor filed in that action).

16 Thus, it is beyond cavil that all of the material allegations of the ETS complaint
17

18 ¹⁰ *See* Rutter, *California Practice Guide*, Weil & Brown, *Civil Procedure Before Trial*, §§5.4 –5.8,
19 5:116.

20 *See also* Witkin, *California Procedure*, 5th Ed., 6 Proceedings Without Trial §175-176:
21 “The clerk’s entry of default cuts off the defendant’s right to take further affirmative steps such as filing a
22 pleading or motion, and the defendant is not entitled to notices or service of pleadings or pa-pers. ‘A
23 defendant against whom a default is entered is out of court and is not entitled to take any further steps in the
24 cause affecting plaintiff’s right of action...” *Garber & Associates vs. Eskandarian* (2007) 150 Cal.App.4th
25 813’ “

23 ¹¹ *See* Exhibit 5, Declaration of Alan Moss In Support Of Claimant’s Response in Opposition To
24 ResCap Borrower Claims Trust’s Seventy -Fifth Omnibus Objection To Claims[Claim No. 4445] filed
October 16, 2014.

25 ¹² *See* Exhibit 5, Declaration of Alan Moss, filed in support of Doc 7667, October 16, 2014.

1 are final and this Court cannot re-visit those allegations. Therefore, ETS must be determined
2 to have negligently harmed Claimant; i.e., for the purposes of this claim, Claimant has con-
3 clusively proven the three factors necessary to demonstrate that ETS was negligent in its
4 treatment of claimant and that Claimant is entitled to money damages as a result: (1) ETS
5 had a duty it owed to Claimant, (2) ETS breached that duty, and (3) that breach caused harm
6 and damage to claimant.

7 For the very same reasons, Claimant has conclusively proven his causes of ac-
8 tion for (1) negligence *per se*, (2) fraud, (3) negligent infliction of emotional distress, and (4)
9 intentional infliction of emotional distress.

10 As a result, this Court cannot re-visit the allegations and causes of action set
11 forth in the ETS Complaint. Contrary to debtor's statement in its brief(at P. 8 thereof) that
12 "As a result, the fact that a default was entered against ETS has no preclusive effect and does
13 not bar an objection to the Moss claim," that is *exactly* the effect the default has on Claim-
14 ant's claim and debtor's instant objection. The claim is entirely valid and precludes debtor's
15 objection.

16
17 **2. The Allegations Of Claimant's California Complaint Must Be**
18 **Taken As True.**

19 Therefore, the following allegations in the ETS complaint must be taken as
20 true:

21 **a. First Cause Of Action: Negligence**

22 I. ¶24: ETS had a duty it owed to claimant to comply with the
23 laws of California and the deed of trust;

24 ii. ¶¶25 – 31: ETS breached that duty because it failed to
25 ascertain whether or not it had the power to conduct a
26

1 sale which resulted in the loss of Claimant's home; and

2 iii. ¶32: ETS's breach caused damage to Claimant.

3
4 **b. Second Cause Of Action: Negligence *Per Se***

5 I. ¶¶33–41: Violation of California statute caused negligent
6 harm to Claimant; and

7 ii. ¶42: Debtor's negligence caused harm to Claimant.

8
9 **c. Third Cause Of Action: Fraud**

10 I. ¶¶44–50: Debtor made representations to intentionally
11 mislead Claimant into believing that the foreclosure sale
12 noticed on plaintiff's residence would not occur;

13 ii. ¶¶51–52: Claimant reasonably relied on these representations
14 to believe that there would be no sale of Claimant's
15 residence;

16 iii. ¶53: Because of these intentional misrepresentations, Claim-
17 ant was harmed when his residence was sold at a trus-
18 tee's sale; and

19 iv. ¶54: Claimant is entitled to damages, both compensatory
20 and punitive, for physical, emotional and financial
21 damages.

22
23 **d. Fourth Cause Of Action: Intentional Infliction Of Emotional**
24 **Distress**

25 I. ¶56: Debtor's actions were intentional and malicious with the

1 purpose of causing plaintiff humiliation, mental anguish
2 and physical distress;

3 ii. ¶¶59-61: Debtor's actions were willful, wanton, malicious
4 and oppressive;

5 iii. ¶62: As a result of debtor's actions, Claimant suffered phy-
6 sical, emotional and financial damages.

7
8 **e. Fifth Cause Of Action: Negligent Infliction Of Emotional Distress**

9 I. ¶63-64: Debtor violated both California law and the deed of
10 trust;

11 ii. ¶¶65-67: As a proximate result of these violations, Claimant
12 was injured and suffered severe emotional damage.

13
14 **B. IN ITS BRIEF, DEBTOR ADMITS THE BASIC ALLEGATIONS OF CLAIMANT'S COMPLAINT**

15
16 As has been previously stated, the central allegation giving rise to this claim
17 is that ETS, the debtor, was illegally substituted in as trustee, and ETS either deliberately ig-
18 nored the fact that it had no power to act as trustee when it sold claimant's home, or negli-
19 gently failed to ascertain whether or not it had the power of sale when it exercised it.

20 In its instant brief, the debtor sets forth, at P. 4, ¶4, the string of assignments
21 of Claimant's deed of trust; specifically, debtor states that "Option One then transferred the
22 Moss Loan to TCIF, LLC("TCIF") on or around September 15, 2007, See TCIF assignment,
23 attached to the Supplemental Declaration as Exhibit F...."

24 Then at ¶11, the debtor states: "ETS was appointed as substitute trustee on
25 September 21, 2006. See Substitution of Trustee, attached to the Supplemental Declaration

1 as Exhibit H."

2 Referral to Exhibit H unequivocally shows that it was TCIF that substituted
3 ETS as the new trustee--the trustee that issued the requisite foreclosure notices under Cali-
4 fornia law, and the entity that conducted the sale of Claimant's home.

5 In sum, ETS, the debtor, was appointed *a full year prior to TCIF acquiring the*
6 *power* via trust deed to substitute in a new trustee.

7 This key fact, this admission was litigated for four years in the Claimant's Cali-
8 fornia action. It is now finally being admitted.

9 Further, debtor states at FN3 of its brief that "The foreclosure sale was con-
10 ducted by the Debtor *in error* due to a failure to communicate timely, notice of conditions
11 that would have warranted a cancellation of the foreclosure. See Rescission of Trustee's
12 Deed Upon Sale."[emphasis supplied].

13 This key fact, this admission, was also litigated for four years in the Claimant's
14 California action. It had never been admitted prior to this point in time.¹³

15 Thus, it is simply beyond cavil that the debtor failed to comport its actions to
16 California law and directly and proximately caused harm to Claimant.

17
18 **C. CONTRARY TO DEBTOR'S SUPPLEMENTAL OBJECTION, THE REQUISITE ELEMENTS**
19 **OF CLAIMANT'S CAUSES OF ACTION HAVE BEEN SATISFIED.**

20 The debtor goes to great lengths in its objection to this claim to try to eliminate
21 the claims of the ETS complaint. Notwithstanding the effects of the default on these issues,
22 i.e., even if the default does not have the effect of conclusively proving these claims, the
23 debtor cannot succeed for the following reasons.

24
25 ¹³ This is also of particular note and highly significant when debtor attempts to argue that its action
26 did not cause Claimant extreme shock and pain. *See infra*.

1 **1. The Negligence Claim**

2 First, as set forth above, the elements of negligence have been satisfied because
3 of the default of ETS.

4 But secondly, even if this were not so, the elements of negligence on the part
5 of ETS have more than amply been satisfied.

6 Debtor argues that of the requisite elements of negligence in California,
7 claimant cannot demonstrate that (1) ETS owed him a duty, and (2) claimant was damaged
8 by ETS's actions. Both assertions are false.

9 **a. ETS, as trustee, unequivocally owed Claimant a duty**

10 Debtor argues that under California law, ETS acting as trustee was not a fidu-
11 ciary. While that may be true, debtor has neither argued or cited any case that stands for the
12 proposition that only a fiduciary can breach a duty. And that is not the law. Put another way,
13 debtor cannot cite to any California case which holds that a trustee does not owe a duty to
14 a trustor such as Claimant herein.

15 As a general matter, in California: "Duty is not sacrosanct in itself, but only an
16 expression of the sum total of those considerations of policy which lead the law to say that
17 the particular plaintiff is entitled to protection." *Friedman vs. Merck & Co.* (2003) 107 Cal.
18 App.4th 454, 464. "The policy considerations to be taken into account in determining whe-
19 ther a duty is imposed by law were set forth in *Rowland vs. Christian* (1968) 69 Cal.2nd 108.
20 "The major considerations are the foreseeability of harm to the plaintiff, the degree of cer-
21 tainty that the plaintiff suffered injury, the closeness of the connection between the defen-
22 dants conduct and the injury suffered, the moral blame attached to the defendants conduct
23 the policy of preventing future harm, the extent of the burden to the defendant and the conse-
24 quences to the community of imposing a duty to exercise care with resulting liability for
25 breach, and the availability, cost, and prevalence of insurance for the risk involved." At P.

1 464.

2 Under California law, the trustee has a duty to the Claimant herein, as an *equal*
3 *agent of both the trustor and the beneficiary*. “As a common agent, the trustee must repre-
4 sent the interests of both parties.” *Ainsa vs. Mercantile Trust Co. Of San Francisco* (1917)
5 174 Cal. 504, 510; *Ballengee vs. Sadlier* (1986) 179 Cal.App.3rd 1, 5; *Kerivan vs. Title Ins.*
6 *& Trust Co.* (1983) 147 Cal.App.3rd 225, 229; Miller And Starr, *California Real Estate*, 3rd
7 Ed., §§10.4, 10.117¹⁴; 48 California Forms of Pleading and Practice §555.57 (1) (a)¹⁵.

8 Moreover, “The trustee is liable to the parties for all damages resulting from
9 its wrongful acts contrary to the terms of the deed of trust if its conduct is negligent, fraud-
10 ulent, or illegal. For example, a trustee may be liable for damages for any unauthorized re-
11 conveyance....” *Id.* citing *Kerivan supra*, *Fleisher vs. Continental Aux. Co.* (1963) 215 Cal.
12 App.2nd 136, 140; *Woodworth vs. Redwood Empire Sav. & Loan Assn.* (1971) 22 Cal.App.3rd
13 347, 366; *Bank of Seoul & Trust Co.* (1988) 198 Cal.App.3rd 113, 118.

14 The Court in *Kerivan* stated:

15 “In *Woodworth vs. Redwood Empire Sav. & Loan Assn.* (1971) 22
16 Cal.App.3rd 347, 366, the court stated as follows: “It is well esta-
17 blished, however, that a trustee under a deed of trust is not a trustee
18 in the technical sense. Rather, he is the agent of all the parties to the
19 escrow at all times prior to performance of the conditions of the es-
crow and bears a fiduciary relationship to each of them. His obli-
gation to each is measured by an application of the ordinary prin-
ciples of agency.”

20 As an agent, the trustee may be liable for negligence in the performance of his duties. This

22 ¹⁴ “A trustee may be liable for damages for wrongful reconveyance. The trustee is a common agent
23 of both parties and is liable for any losses suffered as a result of any intentional or negligent breach of trustee
duties.” citing *Carter vs. Continental Land Title Co.* (1991) 233 Cal.App.3rd 1597, 1599.

24 ¹⁵ “The trustee has a duty to conduct the sale fairly and openly, with due diligence and sound
25 discretion to protect the rights of the trustor and others...” citing *Baron vs. Colonial Mortgage Service*
Co. (1980) 111 Cal.App.3rd 316, 322; *Kleckner vs. Bank of America* (1950) 97 Cal.App.2nd 30, 33.

1 principle was found applicable in *Munger vs. Moore* (1970) 11 Cal.App.3rd 1 where the court
2 stated: "That rule is that a trustee.....may be liable to the trustor..... for damages sustained
3 where there has been an ille-gal, fraudulent or willfully oppressive sale of property under a
4 power of sale contained in a mortgage or deed of trust. An agent has the duty to use reason-
5 able skill and diligence and if he violates this duty, he is liable for any loss which his princi-
6 pal may sustain s the result of his negligence." *Dahl-Beck Electric Co. vs. Rogge* (1969) 275
7 Cal.App.2nd 893."

8 Debtor relies on one case for its argument that ETS did not owe a duty to
9 Claimant: *Kachlon vs. Markowitz* (2008)168 Cal.App.4th 316. This case is inapposite at
10 best. Its factual pattern is incredibly complicated, but what is abundantly clear is that there
11 was no doubt that whatever the trustee or substituted trustee did in *Kachlon*, it had the power
12 to do it because it had been properly appointed. That is pointedly not the case here. The deb-
13 tor cannot point to one California case that holds that an improperly and illegally appointed
14 trustee's actions were upheld. Quite the contrary is true; if improperly appointed, the trustee
15 has no power to do anything, and any actions it takes are void *ab initio*. *Dimock vs. Emerald*
16 *Properties* (2000) 81 Cal.App.Cal.App.4th 868

17 *Kachlon* was not followed by *Perreault vs. NDEX West, LLC*, 2011 WL
18 11682629. In the *Perreault* case, the plaintiff alleged violation of a subsection of Civil Code
19 2924(the statute regarding trustees), the same statute that Claimant herein alleges was
20 breached by debtor.

21 There is simply no question that ETS, as trustee, was operating under a duty
22 to act properly to Claimant.

23 **b. ETS breached the duty it owed to Claimant.**

24 There can be nothing so basic to the statutory scheme than ascertaining whether
25 the trustee had the power to act in that capacity when, as in the instant case, ETS issued the
26

1 two requisite notices prior to the sale, and thereafter issued the Trustee's Deed after it con-
2 ducted the sale.

3 It is beyond doubt that ETS was not properly substituted in as the new trustee,
4 and therefore had no power to issue the requisite notices or to conduct the sale or to issue the
5 trustee's deed. As set forth above, the entity who attempted to substitute in ETS was not yet
6 the beneficiary, and wouldn't become the beneficiary for a year, and had no power to do so.
7 See Debtor's brief at P. 4, ¶¶ 9, 11 which sets forth the relevant dates which demonstrate that
8 ETS had no power. ETS was substituted in as trustee on September 21, 2006 by TCIF, LLC;
9 however, as stated in its brief, "Option One then transferred the Moss loan to TCIF, LLC on
10 or around September 15, 2007." Therefore, ETS could not do anything: it had no power.

11 In California, the power of sale allowed in a non-judicial foreclosure process
12 is a creature of statute(CC§2924-2924h), and any attempt to invoke the power of sale must
13 be strictly reviewed in order to insure compliance with these statutory requirements:

14 "No non-judicial foreclosure of a security interest in real property is permitted
15 except in compliance with this statutory system. Cal.Civ.Code §2924.....Strict compliance
16 with the statutory requirements is obligatory: any statutory deficiency requires that the sale
17 be set aside, provided that the purchaser is not a bona fide purchaser for value without notice
18 of the deficiency. *Anderson vs. Heart Federal Savings*(1989) 208 Cal.App.3rd 202." *In Re*
19 *Tome* (1990) 113 B.R. 626, Bkrtcy C.D. Cal.

20 Under the statute, it is only the *present* beneficiary that has the power to sub-
21 stitute a new trustee—but TCIF was not the beneficiary at the time it recorded the Substitution
22 of Trustee to attempt to make ETS the trustee. Under the deed of trust, only the beneficiary
23 had the power to substitute the trustee, and again TCIF was NOT the beneficiary on Novem-
24
25
26

ber 10, 2006 when the purported substitution was recorded.¹⁶ On that date, it was Option One who was the beneficiary; Option One never substituted ETS to act as trustee.

Because ETS was not duly substituted in as the trustee, ETS had no authority, *ab initio* or ever, to this day, to issue the Notice of Default, or the Notice of Trustees Sale, or the Trustees Deed by which defendant purports to claim title.

Further, Civil Code §2934a provides:

“(a)(1). The trustee under a trust deed upon real property or an estate for years therein given to secure an obligation to pay money and conferring no other duties upon the trustee than those which are incidental to the exercise of the power of sale therein conferred, may be substituted by the recording in the county in which the property is located of a substitution executed and acknowledged by:

(A) **all of the beneficiaries** under the deed of trust....” (emphasis supplied)

ETS was named as trustee in derogation of this statute, because it was not named by a beneficiary of the deed of trust.

There are two cases which specifically hold that any sale conducted by a trustee without the appropriate power to do so are void. See This is patently clear from *Dimock vs. Emerald Properties* (2000) 81 Cal.App.4th 868, where there had been a substitution of trustee that had been properly done; however, the original trustee did not have knowledge of the substitution and went ahead and conducted a sale. The Court ruled that, under the statute and the terms of the deed of trust, once the substitution had been effectuated, the original trustee lost all power to conduct a sale or indeed to do any-thing else, and thus the sale was void

¹⁶ Under the statute, a substitution becomes effective on recordation, and not before. CC §2934a(a)(1). But of course the statute requires the substitution to be done by “all of the beneficiaries” and TCIF was not a beneficiary.

In addition, there are other irregularities present here. First, the substitution was done by an officer(allegedly) of TCIF REO2, LLC. The Notice of Default was issued on behalf of TCIF REO2, LLC. But the assignment did not go to this entity, it went to TCIF, LLC—a completely different legal entity. Thus, even if the substitution had been timely, it was done by a different entity and thus no good.

1 In *Bank of America vs. La Jolla Group II*(2005) 129 Cal.App.4th 706, the duly
2 appointed trustee who issued a Notice of Sale, was the same ETS. But prior to the sale date,
3 unbeknownst to ETS, payment had been made and the loan reinstated. When ETS went
4 ahead with the sale to a BFP, pointedly not the case herein, the Court set aside the sale as
5 void, because once reinstated, the trustee was deprived of the power of sale.

6 A leading treatise on California real estate, Bernhardt, *California Mortgages,*
7 *Deeds of Trust and Foreclosure Litigation*, 4th Ed., §2.25 states: “A party who is not a trustee
8 of record will not have the authority to conduct the foreclosure or deliver a valid trustee’s
9 deed.” *See also Pro Value Props., Inc. Vs. Quality Loan Service Corp.* (2009) 170 Cal.App.
10 4th 579.

11 The debtor cannot argue that it would have been too difficult to discover that
12 it did not have the power of sale. As it states in its brief, it set forth recorded documents
13 which are easily obtainable online.

14 Thus, debtor breached the duty it owed to Claimant.

15
16 **c. ETS’s Breach Caused Harm To Claimant**

17 First, debtor argues that damages did not flow from anything that ETS did, ar-
18 guing that ETS’s only role in these proceedings was “to record the Notices(at the direction
19 of the owner of the Moss Loan and conduct the sale of the Moss Property, both of which
20 have been rescinded. ETS’ recording of the notices did not cause the commencement of the
21 foreclosure process, and therefore cannot be the cause of Mor. Moss’ alleged damages.”¹⁷

22 As explained above, *before* ETS could issue any notices or conduct a property
23 sale, it had to first ascertain whether it was *empowered* to act as the lawful trustee to actually
24

25 ¹⁷ Debtor’s brief at P. 10, ¶30.

1 do these acts. This was neither a difficult task, nor so convoluted that ETS could not have
2 figured it out or done it. After all, this was their business, and on information and belief, it
3 existed solely to service the actions of ResCap. All they had to do was go online and look
4 at the very recorded documents that debtor has attached in support of its instant motion. And
5 evidently, all that ETS did, as a wholly-owned subsidiary of ResCap, was to initiate and carry
6 out this process.

7 The fact is, as explained above, was that ETS was not duly substituted in as
8 trustee, and would not, for at least a year, be so empowered—if then.

9 To hold otherwise would be to conclude that an entity could act as trustee with-
10 out ever checking on who had appointed them, when, and whether they had such power to
11 affect so dramatically peoples lives. Some entity, whether or not the owner of a loan, could
12 just place a call or write a letter and say “Start the foreclosure process. Send out a notice.”
13 Of course, that cannot possibly be the legislative intent when these statutes were adopted, and
14 especially where the process is supposed to be strictly adhered to.

15 And the debtor’s further statement that “ETS’ recording of the notices did not
16 cause the commencement of the foreclosure process”(whatever that means—it is far from
17 clear) is entirely wrong. Under the statute, it was the recording of the notice of default that
18 did cause the commencement of the foreclosure process. *See* Cal. Civil Code 2924a.
19 Otherwise, under the statute, it doesn’t start.

20 Debtor relies on the case of *Freeman vs. King*, 2007 WL 1289810 for authority
21 for their novel proposition. They cannot do so. This California appellate case is ***not citable***
22 ***as authority***¹⁸. The second line of the Westlaw version states: “Not Officially Published(Cal.
23 Rules of Court, Rule 8.1105 and 8.1110, 8.1115)” and then states “California Rules of Court,
24

25 ¹⁸ Claimant therefore moves to strike any mention of, or reliance on this case.

1 Rule 8.1115, restricts citation of unpublished opinions in California courts.”¹⁹ This Cali-
2 fornia case is not citable in any California court or any other court.

3 Debtor also relies on *Bergman vs. Bank of America*, 2013 WL 5863057 as
4 holding that “plaintiff could not show that her damages were caused by an alleged improper
5 substitution of trustee where the loan was in default at the time of foreclosure.” This 52-page
6 decision, arising from an FRCP 12(b)(6) motion from three defendants, is anything but so
7 simplistic. As best as Claimant can ascertain, since he doesn’t have the Westlaw version of
8 the case, only the Memorandum opinion from PACER, the Court held that the cause of action
9 against the trustee was not validly pled because the complaint did not allege that the trustee
10 knew that it lacked authority at the time it recorded the notices.²⁰ This is hardly authority to
11 be relied on for this proposition.

12 Lastly, debtor makes the uninformed statement that Claimant did not pay his
13 mortgage(it wasn’t a mortgage) which resulted in the commencement of foreclosure and
14 therefore can’t show that his damages were caused by ETS. First, there is no authority for
15 this statement, and none can be given because it isn’t the law. Second, at the time of the
16 foreclosure, there was no default and debtor has merely argued a heresay statement. As
17 pointed out above, the debtor has admitted that there was supposed to be no sale. Third, even
18 if there was a default, that cannot possibly excuse a violation of California law, especially
19

20 ¹⁹ California Rule Of Court 8.1115:

21 (A) Unpublished Opinions

22 “Except as provided in (b), an opinion of a California Court of Appealthat is not certified for publication
or ordered published must not be cited or relied on by a court or a party in any other action.

23 (B) Exceptions

An unpublished opinion may be cited or relied on:

24 (1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

25 ²⁰ See Slip Op. At P. 29.

1 where it has been repeatedly held that the procedural aspects of the foreclosure process must
2 be “strictly adhered to.” Is the debtor’s argument something like “Because Claimant
3 *supposedly* missed a payment(s), that caused me to violate California law?” If a negligent
4 driver sustains injuries as a result of his driving, is that a defense as to a physician who
5 thereafter negligently treats him for those injuries? Of course not.

6
7 **d. Emotional damages lie even absent physical harm/Negligent Infliction**
8 **of Emotional Distress**

9 First, debtor has no standing to raise this issue because of its default and the
10 established factors set forth above.

11 Debtor’s protestations notwithstanding, physical harm is not a requirement in
12 California to be awarded damages for negligent infliction of emotional distress. California
13 recognizes a right to recover damages for serious emotional distress in a negligence action.
14 *Molien vs. Kaiser Found. Hosp.*(1980) 27 Cal.App.3rd 916, 930. A plaintiff may recover
15 general damages for emotional distress, pain and suffering, along with other compensatory
16 damages. *Merrill vs. Los Angeles Gas & Elec. Co.*(1910) 158 Cal. 499, 511; *Niles vs. City*
17 *of San Rafael* (1974) 42 Cal.App.3rd 230, 244. See Witkin, 4 *Summary of California Law*,
18 10th Ed. §1022.

19 Negligent infliction of emotional distress refers to the recovery of damages by
20 a plaintiff who has not otherwise suffered any physical or bodily injury, for emotional dis-
21 tress arising from a defendant’s negligent conduct. *Molien, supra* at 924. In 1980, the Cali-
22 fornia Supreme Court abolished the “physical injury” requirement. *Molien supra*, 930;
23 *Potter vs. Firestone Tire and Rubber* (1993) 6 Cal.4th 965, 986. Under this rule, one may
24 recover for emotional distress suffered as the result of a negligent act that placed the plaintiff
25 in fear for his personal well-being, regardless of whether there is any physical impact and
26

1 regardless of whether the emotional distress is accompanied by any physical manifestation
2 of injury. *Molien supra* at 924; *Burgess vs. Superior Court* (1992) 2 Cal.4th 1064, 1074.²¹

3 Damages for emotional distress may be recovered in a tort action for fraud.
4 *Branch vs. Homefed Bank*(1992)6 Cal.App.4th 793, 799.

5 Further, all detriment proximately caused by the breach of a duty imposed by
6 statute, as here, is compensable, including damages of emotional distress. *Pintor vs. Ong*
7 (1989) 211 Cal.App.3rd 837, 841. It is not necessary that the plaintiff suffer other injury in
8 addition to the emotional distress. *Pintor supra* at 845. For example, damages for emotional
9 distress have been awarded for a breach of the duty imposed by Cal. Civil Code §2941, re-
10 quiring reconveyance of real property after a debt secured by a deed of trust has been satis-
11 fied. *Pintor at 841; this is part of the statutory scheme imposing a duty on trustees.*

12 In California, the courts have adopted a unitary concept of pain and suffering,
13 without attempting to bifurcate them, and this term has been used ad applied to a plaintiff
14 who may recover not only for physical pain but also for fright, nervousness, grief, anxiety,
15 worry, mortification, shock m humiliation, indignity, embarrassment, apprehension, terror,
16 ro ordeal. *Capelouto vs. Kaiser*(1972) 7 Cal. 3rd 889, 893. Medical testimony is not re-
17 quired. No definite method of calculation is prescribed by law by which to fix compensation
18 for pain and suffering. It is required only that the award be just and reasonable in light of the
19 evidence. *Garfoot vs. Avila*(1989)213 Cal.App.3rd 1205. Lastly, a jury may compute pain and
20 suffering damages by the per diem method by which damages are measured in terms of a
21 stated number of dollars for specific period of time. *Beagle vs. Vasold*(1966) 65 Cal.2nd 166,
22 173.

23 This is exactly what Claimant did in calculating his damages. Although criti-
24

25 ²¹ See 32 California Forms of Pleading and Practice §362.11 *et seq.*

1 cized by debtor, this is perfectly allowable in California. And the calculations were based
2 on the severe emotional distress and shock as this matter was unrolling. *See* Declaration of
3 Alan Moss filed herewith.

4 Claimant's right to emotional distress damages is clearly mandated by *Munger*
5 *vs. Moore* (1970) 11 Cal.App.3rd 11, which held: "The measure of damages for a wrong other
6 than breach of contract will be an amount sufficient to compensate the plaintiff for all detri-
7 ment, foreseeable or otherwise, proximately occasioned by the defendant's wrong."

8 In *Spinks vs. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th
9 1004, 1040, a wrongful eviction case, the Court stated: "The recovery includes all conse-
10 quential damages occasioned by the wrongful eviction(personal injury, including infliction
11 of emotional distress, and property damage),,,and upon a proper showing of malice, punitive
12 damages." At 1039.

13 Debtor's reliance on *Friedman, supra*, is misplaced and whose connection with
14 this instant case is attenuated at best, especially keeping in mind the *Rowland* factors.
15 *Friedman* is a complex case wherein a vegan underwent a medical procedure, after asking
16 and being told that there were no animal products involved. It is hard to imagine a case
17 further away from this case, where the debtor admittedly violated a statutory duty.²²

18 First, the holding that debtor relies on is part of the decision involving negli-
19 gent misrepresentation. This case does not involve such a cause of action and is therefore
20 inapposite.

21 ²² Debtor sets forth in its brief that this case relies on *Branch vs. Homefed Bank* (1992) 6 Cal.App.4th
22 793, 798 even to the extent of quoting it. But this is what the brief did not quote, the actual holding of the
23 case: "We conclude, however, that the award of damages for emotional distress must be reversed. We restate
24 that which we believe to be settled law, namely that damages for emotional distress are ordinarily not
25 recoverable in an action for negligent misrepresentation when the injury other than the emotional distress
26 is only economic." Pointedly, the instant case is not such a case and this is no authority to support debtors
argument. Further, debtor's other cited case, *Smith vs. Superior Court*, states that this holding in *Branch* is
dicta. At P. 1040.

1 Second, to the extent that this case stands for the proposition that emotional
2 distress damages do not lie in the absence of physical harm, as debtor argues, it is inapposite
3 to the instant case. The operative complaint in this matter alleges that, at ¶32: "As a direct
4 and proximate result of the negligence of defendant ETS, as set forth above, plaintiff sus-
5 tained damage, both physically, emotionally and financially, and plaintiff prays judgment
6 against defendant as hereinafter set forth."

7 Thus, debtor's arguments are of no avail. Because of the default, it must be
8 taken as true that Claimant suffered physical and emotional and economic injury.

9 Nor does its reliance on the only other case it cites, fare any better. *Smith vs.*
10 *Superior Court* (1992) 10 Cal.App.4th 1033 is at least as attenuated from the case at bar as
11 *Friedman*. This is a legal malpractice case, arising from a divorce. This case holding is
12 restricted to legal malpractice cases.

13 But if it were broader, its holding is that emotional distress damages are
14 recoverable where there is an allegation of intentional or affirmative misconduct. Claimant's
15 complaint alleges just such activity.

16 17 **2. Negligence *per se***

18
19 In Paragraph 28, debtor argues that negligence *per se* cannot be maintained.
20 It cites two cases. One case, *LeBeau vs. Bank of America*(2014) 2014 WL 4809843, cannot
21 be cited or relied on. See California Rules of Court 8.1115. The opinion on WestLaw says
22 just that.

23 As to the other case, *Maomanivong vs. National City Mtg.*(2014) 2014 WL
24 4623873, this was a loan modification case, against the lender, not the trustee. Thus it is
25 totally inapposite. And there is no case cited by debtor that supports its position. That is
26

1 hardly authority for debtor to rely on.
2

3 **3. Fraud**

4 First, debtor has no standing to raise this issue because of its default and the
5 established factors set forth above.

6 Notwithstanding this, debtor argues that Claimant cannot demonstrate that he
7 suffered the damage element required of fraud because the statutory notices *illegally* issued
8 by ETS, and which then caused significant and continuing damage to Claimant, have been
9 withdrawn. Further, debtor argues that any damages incurred in fighting and reversing the
10 foreclosure was caused, not by the illegal actions of the debtor itself, but by Claimant's de-
11 fault.

12 This argument is an affront to logic, propriety, the law, and just common sense
13 and decency. And it ignores the basic facts that ETS acted illegally and in contravention of
14 the California statutes when it did issue these two notices(Notice of Default and Notice of
15 Trustee Sale) and, after selling Claimant's home, conveying the trust deed to the bank. That
16 the notices have been withdrawn, and that Claimant's home has been returned to him *does*
17 *not obviate all of the damage, including extreme emotional damage he incurred for the three*
18 *plus years of litigating against a major corporation, with unlimited assets, to accomplish*
19 *this. It is beyond cavil that the debtor would not have rescinded the notices nor reversed the*
20 *sale absent this enormous amount of litigation.* Perhaps if debtor could demonstrate to this
21 court that it voluntarily admitted its mistakes, withdrew these notices and reversed the sale
22 of Claimant's home, thereby not necessitating all of this litigation, that might be one thing.
23 But that is not the case or the truth. The fact is that debtor used every means at its disposal
24 to attempt to bury Claimant, and did so for a period exceeding three years. Debtor attempts
25 to circumvent this by arguing that the beneficiary was not ResCap, but this is fallacious at
26

1 best. It was ResCap, as the servicer, who conducted this litigation, forced it to go on and on,
2 and refused to concede the most basic facts which have now been admitted in this matter.

3 By way of example, if a motorist negligently causes an accident with resultant
4 harm to himself, would he be barred from suing a physician who thereafter negligently
5 treated him, on the grounds that the motorist brought the injuries on himself? Hardly. The
6 physician's negligence is separate and apart from whatever negligence the motorist may have
7 committed: it was not the negligence of the driver who forced the physician to be negligent.
8 Likewise, even if Claimant was in default, which he wasn't, that did not cause ETS to violate
9 the law. That violation, which caused all of claimant's damages, occurred only because of
10 debtor's callous disregard for California law.

11 Debtors reliance on *De La Cerra Frances vs. de Anda*(224 Fed.Appx. 637(9th
12 Cir. 2007) is, to state it (or perhaps understate it) bluntly, misplaced. This case does state that
13 a fraud claim cannot rest solely on emotional distress damages, but relies specifically on a
14 California case, *Schroeder vs. Auto Driveway Co.*(1974) 11 Cal.3rd 908. But had debtor
15 bothered to read *Schroeder*, they would not have found such a holding in this case. Rather,
16 the Court held just the opposite: "Consequently, defendants, having failed to move for a new
17 trial, cannot now contend that the award of damages is excessive.[fn omitted]." At P.918.²³
18 This case actually upheld an award of damages for fraud.

19 Second, the debtor offers no evidence to this Court that the Claimant was in
20 default at the time of these actions. Therefore, this argument is of no avail. And it cannot.

21 Third, the argument ignores that Claimant has proved the elements necessary

22 ²³ However, even though the Court did not review the challenge to the award of damages, it stated
23 some concepts that are helpful to the challenges raised by debtor herein. For example, "recovery will not
24 be denied because the damages are difficult of ascertainment." (P. 921); "Mrs. Schroeder is entitled to
25 compensation for pain, suffering, and emotional distress"; "If the action is one in tort, exemplary damages
26 may be recovered upon a proper showing of malice, fraud, or oppression even though the tort incidentally
involves a breach of contract."

1 for fraud.

2 Fourth, Claimant has set forth compensable damages. *See* Declaration of Alan
3 Moss, filed herewith.

4 Thus, Debtor has not advanced any theory to defeat the Fraud cause of Action,
5 and the damages flowing therefrom.

6

7 **4. Intentional Infliction of Emotional Distress(IIED)**

8 Lastly, debtor argues that Claimant cannot assert a cause of action for IIED,
9 relying on *Aguinaldo vs. Ocwen Loan Serv. LLC* 2012 WL 3835080, which in turn relied on
10 *Davenport vs. Litton Loan Servicing* (N.D. Cal. 2010) 725 F.Supp.2d 862; *Mehta vs. Wells*
11 *Fargo Bank*(N.D. Cal. 2010) 737 F.Supp.2d 1185; and *Ottovich vs. Washington Mutual*(2010)
12 2010WL 3769459.

13 These cases are inapposite to this instant case. The holdings of these cases are
14 necessarily limited to the facts of the cases.

15 In *Aguinaldo*, the allegations of the case were, according to the Court,
16 “conditional” promises and therefore unable to support a classification of outrageous con-
17 duct. In *Davenport*, the Court found the allegations of “certified mail failure and the refusal,
18 after meeting with her and her legal representative to modify her loan also do not, *by them-*
19 *selves*, qualify as outrageous....”(P. 884, emphasis supplied). In *Mehta*, the Court found only
20 a conditional promise to forestall a sale. In *Ottovich*, the IIED claim was dismissed because
21 it was inadequately pled, and plaintiff was allowed to amend.

22 Thus, two of the four cases were allowed to amend, and all were found to be
23 insufficient because of “conditional” promises and inadequate specificity.

24 Not one of these cases rises to the level of the instant case, wherein ETS deli-
25 berately and intentionally violated California statutes controlling the activities of trustees.

26

1 This is categorically different than, and far more serious than, these four cases. None of
2 them pointed to a violation of California law or could.

3 Therefore, these cases are not authority to hold that Claimant cannot obtain
4 damages for IIED.

5 Further, the allegations of the complaint, that ETS intentionally violated state
6 law with the intent to harm Claimant, have to be taken as true because of the default. This
7 is yet another factor in finding that debtor's four cases are inapposite to this case.

8 Behavior may be considered outrageous if a defendant (1) abuses a relation
9 or position that gives him power to damage the plaintiff's interest; (2) know the plaintiff is
10 susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with
11 the recognition that the acts are likely to result in illness through mental distress. *Agarwal*
12 *vs. Johnson*(1979) 25 Cal.3rd 932, 946. Neither physical injury or monetary loss is required
13 to be actionable. *Grimes vs. Carter* (1966) 241 Cal.App.2nd 694.

14 Severe emotional distress was found to exist in *Fletcher vs. Western Nat. Life*
15 *Ins. Co.*(1970) 10 Cal.App.3rd 376 even though testimony showed the plaintiff suffered no
16 shock, horror, or similar physical effects and that most of his distress resulted from his
17 unfortunate economic situation. The Court held it may "consist of any highly unpleasant
18 mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, dis-
19 appointment, and worry." P. 397. When this involved losing his home, all continuing for
20 many months, this was adequate for IIED.²⁴

21 Therefore, debtor's objections should be overruled.

22
23 ///

24
25 ²⁴ See Witkin, 5 Summary of California Law, §452.

1 **CONCLUSION**

2

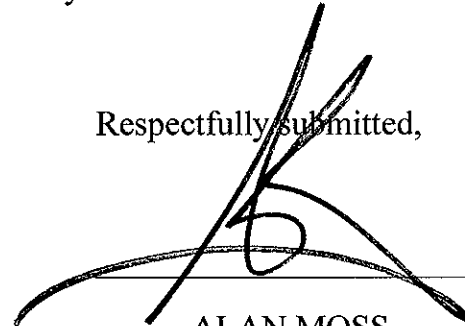
3 For the foregoing reasons, and each of them, the debtor's objections should be

4 overruled, and Claimant's claim allowed in its entirety.

5

6 Dated: January 22, 2015

Respectfully submitted,

7 

8

9 ALAN MOSS

10 *Attorney In Propria Personum*

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1 Alan Moss
P.O. Box 721
2 Moss Beach CA 94038
Telephone: (415)494-8314
3 Facsimile: (650)728-0738

4 Attorney *In Pro Per*

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9 IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
10 MANHATTAN DIVISION

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12 IN RE:

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15 RESIDENTIAL CAPITAL, LLC, *ET AL.*
16
17 Debtors.)

) BANKRUPTCY CASE NO. 12-12020-MG
) CHAPTER 11

) Jointly Administered
) (Executive Trustee Services, Case No. 12-
) 12028)

) **DECLARATION OF ALAN MOSS IN SUPPORT**
) **OF HIS RESPONSE IN OPPOSITION TO**
) **RESCAP BORROWER CLAIMS TRUST'S**
) **SEVENTY-FIFTH OMNIBUS OBJECTIONS TO**
) **CLAIMS**

[Claim No. 4445]

Hearing Date: February 11, 2015

Hearing Time: 10:00 A.M.

18
19 Claimant, ALAN MOSS, declares as follows:

20 I am the Claimant in Claim NO. 4445. If called to testify, I would aver as fol-
21 lows:

22
23 1. Attached hereto and made a part hereof as **Exhibit 1** is a true and correct
24 copy of the entry of default against the defendant Executive Trustee Services in the case of
25 *Alan Moss vs. Executive Trustee Services et al.*, Action No. CIV505386, State of California,

1 County of San Mateo Superior Court, denoted hereinafter as the "ETS complaint." This
2 document bears the official "file" stamp of the clerk of the court, with the file date of June
3 17, 2011;

4 3. The ETS complaint is still pending in California's San Mateo County
5 Superior Court, but has been "stayed" because of this bankruptcy.

6 4. Attached hereto and made a part hereof as **Exhibit 2** is a true and correct
7 copy of the "Register Of Actions" in the case of *Alan Moss vs. Executive Trustee Services*
8 *et al.*, Action No. CIV505386, State of California, County of San Mateo Superior Court.
9 This shows, as its first entry, that I paid \$395.00 as and for the filing fee.

10 3. Attached hereto and made a part hereof as **Exhibit 3** is a true and correct
11 copy of the scheduling sheet used by the court clerk to set the prove-up hearing in *Alan Moss*
12 *vs. Executive Trustee Services et al.*, Action No. CIV505386, State of California, County of
13 San Mateo Superior Court.

14 4. In addition to the filing fee, I incurred attorney fees in the amount of
15 \$16,960.98 in prosecuting the case of *Alan Moss vs. Bank of New York.*, Action No. CIV
16 486130, County of San Mateo Superior Court. At that point in time, I could no longer afford
17 the attorney fees required to fight this case, and was forced to represent myself for the next
18 three years.

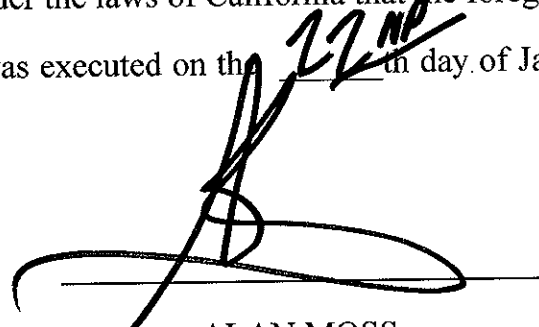
19 5. As a result of the illegal activities of ETS, I was forced to litigate against
20 the servicer of my loan in an attempt to regain my home. Although the name of the case is
21 against the Bank of New York, the case was run by ResCap as the servicer of the loan. It
22 was ResCap who made all the decisions in the case and kept litigating it for over three years.

23 6. This litigation, as well as the underlying cause of it, caused me extreme
24 emotional distress for a period of three and a half years, together with shock, anxiety and the
25 like. I was forced to work on this case nearly full time throughout this period to stave off the
26

1 continuing actions of a major San Francisco law firm. At no time during this period was
2 there ever any admission of the illegality of the substitution of the trustee or of the
3 cancellation of the trustee sale that resulted in the loss of my home. The fact that the case
4 resolved was evidently due to the substitution of new servicer and a new attorney on the case,
5 not anything that ResCap did to try and resolve the matter. Further, this extreme anxiety,
6 continuous in nature, caused certain physical ailments because of the intensity, pressure,
7 worry, and constant nature of this matter for three plus years.

8 7. As a result of this, I attempted to place a dollar figure on this emotional
9 distress by the amount of time it was ongoing, because that was required by the official
10 California court forms.

11
12 I declare under penalty of perjury under the laws of California that the foregoing is
13 true and correct and that this Declaration was executed on the 22nd day of January,
14 2015.

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18 ALAN MOSS
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EXHIBIT ONE

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State number, and address):

Pg 37 of 47

FOR COURT USE ONLY

ALAN IRVING MOSS
P.O. BOX 721
MOSS BEACH CA 94038

TELEPHONE NO.: (415) 730-1453

FAX NO. (Optional):

E-MAIL ADDRESS (Optional):

ATTORNEY FOR (Name): IN PRO PER

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO

STREET ADDRESS: 400 GOVERNMENT CENTER

MAILING ADDRESS:

CITY AND ZIP CODE: REDWOOD CITY CA 94063

BRANCH NAME:

PLAINTIFF/PETITIONER: ALAN IRVING MOSS

DEFENDANT/RESPONDENT: EXECUTIVE TRUSTEE SERVICES, LLC

REQUEST FOR ☒ Entry of Default☐ Clerk's Judgment(Application) ☐ Court Judgment

CASE NUMBER:

CIV 505386

FILED
SAN MATEO COUNTY

JUN 17 2011

Clerk of the Superior Court

By

DEPUTY CLERK

1. TO THE CLERK: On the complaint or cross-complaint filed

a. on (date): MAY 5, 2011

b. by (name): ALAN IRVING MOSS

c. ☐ Enter default of defendant (names):

EXECUTIVE TRUSTEE SERVICES, LLC f/k/a EXECUTIVE TRUSTEE SERVICES, INC.

d. ☐ I request a court judgment under Code of Civil Procedure sections 585(b), 585(c), 989, etc., against defendant (names):

(Testimony required. Apply to the clerk for a hearing date, unless the court will enter a judgment on an affidavit under Code Civ. Proc., § 585(d).)

e. ☐ Enter clerk's judgment

(1) ☐ for restitution of the premises only and issue a writ of execution on the judgment. Code of Civil Procedure section 1174(c) does not apply. (Code Civ. Proc., § 1169.)

☐ Include in the judgment all tenants, subtenants, named claimants, and other occupants of the premises. The Prejudgment Claim of Right to Possession was served in compliance with Code of Civil Procedure section 415.46.

(2) ☐ under Code of Civil Procedure section 585(a). (Complete the declaration under Code Civ. Proc., § 585.5 on the reverse (item 5).)

(3) ☐ for default previously entered on (date):

2. Judgment to be entered.

Amount

Credits acknowledged

Balance

a. Demand of complaint..... \$

\$

\$

b. Statement of damages *

(1) Special \$

\$

\$

(2) General \$

\$

\$

c. Interest \$

\$

\$

d. Costs (see reverse) \$

\$

\$

e. Attorney fees \$

\$

\$

f. TOTALS \$

\$

g. Daily damages were demanded in complaint at the rate of: \$

per day beginning (date):

(* Personal injury or wrongful death actions; Code Civ. Proc., § 425.11.)

3. ☐ (Check if filed in an unlawful detainer case) Legal document assistant or unlawful detainer assistant information is on the reverse (complete item 4).

Date: JUNE 16, 2011

ALAN MOSS

(TYPE OR PRINT NAME)

(SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

FOR COURT
USE ONLY

(1) ☒ Default entered as requested on (date):(2) ☐ Default NOT entered as requested (state reason):

JUN 17 2011

JOHN C. FITTON

Clerk, by

Deputy

PLAINTIFF/PETITIONER: MOSS

Pg 38 of 47

CA NUMBER:

DEFENDANT/RESPONDENT: ETS

CL v 505386

4. Legal document assistant or unlawful detainer assistant (Bus. & Prof. Code, § 6400 et seq.). A legal document assistant or unlawful detainer assistant ☐ did ☒ did not for compensation give advice or assistance with this form. (If declarant has received *any* help or advice for pay from a legal document assistant or unlawful detainer assistant, state):

a. Assistant's name:

b. Street address, city, and zip code:

c. Telephone no.:

d. County of registration:

e. Registration no.:

f. Expires on (date):

5. ☐ Declaration under Code of Civil Procedure Section 585.5 (required for entry of default under Code Civ. Proc., § 585(a)).

This action

- a. ☐ is ☒ is not on a contract or installment sale for goods or services subject to Civ. Code, § 1801 et seq. (Unruh Act).
 b. ☐ is ☒ is not on a conditional sales contract subject to Civ. Code, § 2981 et seq. (Rees-Levering Motor Vehicle Sales and Finance Act).
 c. ☐ is ☒ is not on an obligation for goods, services, loans, or extensions of credit subject to Code Civ. Proc., § 395(b).
6. Declaration of mailing (Code Civ. Proc., § 587). A copy of this Request for Entry of Default was
- a. ☐ not mailed to the following defendants, whose addresses are unknown to plaintiff or plaintiff's attorney (names):

- b. ☒ mailed first-class, postage prepaid, in a sealed envelope addressed to each defendant's attorney of record or, if none, to each defendant's last known address as follows:

(1) Mailed on (date):

MAY 16, 2011

(2) To (specify names and addresses shown on the envelopes):

EXECUTIVE TRUSTEE SERVICES
15455 S.F. MISSION BLVD.
MISSION HILLS CA 91345

I declare under penalty of perjury under the laws of the State of California that the foregoing items 4, 5, and 6 are true and correct.

Date: MAY 16, 2011

ALAN MOSS

(TYPE OR PRINT NAME)

(SIGNATURE OF DECLARANT)

7. Memorandum of costs (required if money judgment requested). Costs and disbursements are as follows (Code Civ. Proc., § 1033.5):

a. Clerk's filing fees \$
 b. Process server's fees..... \$
 c. Other (specify): \$
 d. \$
 e. TOTAL \$

f. ☐ Costs and disbursements are waived.

g. I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF DECLARANT)

8. ☐ Declaration of nonmilitary status (required for a judgment). No defendant named in item 1c of the application is in the military service so as to be entitled to the benefits of the Servicemembers Civil Relief Act (50 U.S.C. App. § 501 et seq.).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF DECLARANT)

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EXHIBIT TWO

SAN MATEO SUPERIOR COURT
Register of Actions

1/21/15

Page: 1

Case Number : CIV505386
Case Name ...: ALAN IRVING MOSS VS EXECUTIVE TRUSTEE SER., LLC
Case Type ...: Unlimited Civil Case Status : Dispo'd
Category: CIVIL COMPLAINT
Jurisdiction: South Court

Complaint Type : COMPLAINT
Disposition ...: DISPO'D
Date: 5/23/12

Filed : 5/05/11

PLAINTIFF(s):

ALAN IRVING MOSS

DISPO'

DEFENDANT(s):

EXECUTIVE TRUSTEE
SERVICES, LLC Default
FKA: EXECUTIVE TRUSTEE SERVICES,
INC

ATTORNEY:
Pro/Per

and DOES 1 through 50 Dismissed

Action Date	Description	Disposition
5/05/11	(S) Complaint filed Receipt: 110506-0149 \$395.00	-
	Civil Case Coversheet Received	-
	30 day summons, issued and filed.	-
6/02/11	Proof of Personal Service of Summons and COMPLAINT of MOSS served on EXECUTIVE TRUSTEE SERVICES, LLC; FKA:EXECUTIVE TRUSTEE SERVICES, INC by serving BRADLEY ELLISON, AGENT FOR SERVICE with service date of 05/09/11	-
6/17/11	Request for Default filed and Default entered on COMPLAINT of MOSS as to EXECUTIVE TRUSTEE SERVICES, LLC; FKA:EXECUTIVE TRUSTEE SERVICES, INC.	-
	Default Entered as to EXECUTIVE TRUSTEE SERVICES, LLC; FKA:EXECUTIVE TRUSTEE SERVICES, INC	-
8/22/11	Statement of OF DAMAGES filed by ALAN IRVING MOSS	-
	Proof of Service (personal) of STATEMENT OF DAMAGES * served on EXECUTIVE TRUSTEE SERVICES, LLC; FKA:EXECUTIVE TRUSTEE SERVICES, INC with service date of 08/09/11 filed.	-

SAN MATEO SUPERIOR COURT
Register of Actions

1/21/15

Page: 2

Case Number : CIV505386
Case Name ... ALAN IRVING MOSS VS EXECUTIVE TRUSTEE SER., LLC
Case Type ... Unlimited Civil Case Status : Dispo'ed
Category ... CIVIL COMPLAINT
Jurisdiction: South Court

=====

8/26/11 CASE MANAGEMENT CONFERENCE CONTINUE
Dept.: 7 Time : 9:00
Hearing continued to 12/02/11 at 9:00 in
Department 7.

11/28/11 Case Management Statement filed by ALAN IRVING -
MOSS.

12/01/11 HCMC1I calendared on 12/02/11 in dept. 7. -
Has been updated to 12/02/11 in dept. 21.

12/02/11 CASE MANAGEMENT CONFERENCE CONTINUE
Dept.: 21 Time : 9:00
Honorable Robert D. Foiles, Judge Presiding.
Clerk: Cheryl Lyssand, Court Reporter: Cindy Del
Rosario
ALAN IRVING MOSS appeared in pro per by CourtCall.
The Court is informed a prove-up hearing will be
set.
Hearing continued to 03/07/12 at 9:00 in
Department 7.
PLAINTIFF to give notice.
PLAINTIFF shall submit an updated Case Management
statement.
If a judgment is filed then no appearance is
required.
Entered by C Lyssand on 12/02/11.
- 11 -

3/01/12 REQUEST TO SET HEARING ON UNCONTESTED CALENDAR -
(DEFAULT PROVE-UP), filed.

3/06/12 First paper fee paid by EXECUTIVE TRUSTEE -
SERVICES, LLC; FKA:EXECUTIVE TRUSTEE SERVICES,
INC.
Receipt: 120306-0801 \$395.00

Notice of Motion AND MOTION TO SET ASIDE ENTRY OF -
DEFAULT BASED ON EXCUSABLE MISTAKE filed by
EXECUTIVE TRUSTEE SERVICES, LLC; FKA:EXECUTIVE
TRUSTEE SERVICES, INC

Declaration OF ILENA KOUVABINA INSUPPORT OF -
MOTION TO SET ASIDE ENTRY OF DEFAULT

Declaration OF CAROL BONELLO IN SUPPORT OF -
EXECUTIVE TRUSTEE SERVICES, LLC'S MOTION TO SET

SAN MATEO SUPERIOR COURT

1/21/15

Register of Actions

Page: 3

Case Number : CIV505386
Case Name ...: ALAN IRVING MOSS VS EXECUTIVE TRUSTEE SER., LLC
Case Type ...: Unlimited Civil Case Status : Dispo'ed
Category ...: CIVIL COMPLAINT
Jurisdiction: South Court

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ASIDE

Proof of service of DEFENDANT'S NOTICE OF MOTION, -
ETC. served on MR. ALAN IRVING MOSS by USPS with
a service date of 03/06/12.

3/07/12 CASE MANAGEMENT CONFERENCE CONTINUE
Dept.: 7 Time : 9:00
Hearing continued to 06/08/12 at 9:00 in
Department 7.

3/09/12 HEARING DEFAULT PROVE-UP. COMPLETE
Dept.: PJ Time : 9:00
Honorable Beth Labson Freeman, Judge Presiding.
Clerk: Sean Kane, Court Reporter: Chris Perez
Attorney(s): ELENA KOUVABINA appearing for
Defendant Executive Trustee Services, LLC.
ALAN IRVING MOSS not present.
Court informs defense counsel it received a
telephone call from Mr. Moss informing the court
that he did not intend to proceed with a prove-up
hearing today, as Defendant has filed a motion to
set aside entry of default.
Matter dropped from calendar.
If Defendant's motion is denied, Plaintiff must
re-calendar his default prove-up hearing
himself.
Entered by S KANE on 03/09/12.

=====

4/04/12 Notice OF WITHDRAWAL OF MOTION TO SET ASIDE ENTRY -
OF DEFAULT filed by EXECUTIVE TRUSTEE SERVICES,
LLC; FKA:EXECUTIVE TRUSTEE SERVICES, INC.

Motion fee paid by EXECUTIVE TRUSTEE SERVICES, -
LLC; FKA:EXECUTIVE TRUSTEE SERVICES, INC.
Receipt: 120404-0443 \$40.00

Notice of Motion AND MOTION TO SET ASIDE ENTRY OF -
DEFAULT BASED ON EXTRINSIC FRAUD OR MISTAKE filed
by EXECUTIVE TRUSTEE SERVICES, LLC; FKA:EXECUTIVE
TRUSTEE SERVICES, INC

Declaration OF CAROL BONELLO IN SUPPORT OF -
EXECUTIVE TRUSTEE SERVICES MOTION TO SET ASIDE
DEFAULT

Declaration OF ELENA KOUVABINA IN SUPPORT OF -

Case Number : CIV505386
Case Name : ALAN IRVING MOSS VS EXECUTIVE TRUSTEE SER., LLC
Case Type : Unlimited Civil
Category : CIVIL COMPLAINT
Jurisdiction: South Court
=====

MOTION TO SET ASIDE ENTRY OF DEFAULT

HEARING: MOTION RE: TO SET ASIDE ENTRY OF DEFAULT OFF-CAL
FILED BY EXECUTIVE TRUSTEE SERVICES, LLC;
FKA:EXECUTIVE TRUSTEE SERVICES, INC
Dept.: LM Time : 9:00
Hearing off calendar. Reason: PER MOVING PARTY'S
NOTICE OF WITHDRAWAL OF MOTION, FILED 4/4/12.

5/17/12 ALAN IRVING MOSS's Response TO DEFENDANT'S MOTION
TO SET ASIDE DEFAULT filed.

- Declaration OF ALAN MOSS IN SUPPORT OF
PLAINTIFF'S RESPONSE TO MOTION TO SET ASIDE
DEFAULT

5/23/12 Case Dispo'd - Bankruptcy/Federal Court
Notification Received

- Notice OF STAY OF PROCEEDINGS filed by EXECUTIVE
TRUSTEE SERVICES, LLC; FKA:EXECUTIVE TRUSTEE
SERVICES, INC.

5/31/12 HEARING: MOTION RE: TO SET ASIDE ENTRY OF DEFAULT
COMPLETE
FILED BY EXECUTIVE TRUSTEE SERVICES, LLC;
FKA:EXECUTIVE TRUSTEE SERVICES, INC
Dept.: LM Time : 9:00

Honorable Joseph C. Scott, Judge presiding.
Clerk: Linda Makela. Court Reporter: MAKELA.
No appearance is made by any parties herein or
their counsel of record.

ACTION AUTOMATICALLY STAYED, BANKRUPTCY PETITION
FILED BY MOVING PARTY ON 05/14/12.

=====

Entered by LMAKELA on 05/31/12.

6/08/12 CASE MANAGEMENT CONFERENCE
Dept.: 7 Time : 9:00
VACATED

**** END OF CASE PRINT ****

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EXHIBIT THREE

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

CASE NO: CIV 505386

FILED
SAN MATEO COUNTY

MAR 01 2012

Clerk of the Superior Court

By [Signature]
DEPUTY CLERK

IN THE MATTER OF:

MOSS

VS.

EXECUTIVE TRUSTEE SERVICES

To the Clerk:

March 9, 2012
9:00AM

Dept PJ

You are requested to set the above matter for hearing on the Uncontested Calendar

for PROVE UP HEARING.

Hearing Time Estimate: 10 MIN.

In accordance with Rule 6.1 of the Rules of the Superior Court of the County of San Mateo, I certify that all requisite pleadings and documents have been filed.

Attorney

ALAN MOSS ROBER

Address

P.O. Box 721

MOSS BEACH CA 94038

Phone

(415) 494-8374

NOTICE: The Court requires advance notice on all hearings where the anticipated time to hear the matter is no longer than **TEN (10)** minutes. If a default or uncontested hearing time is anticipated that exceeds ten (10) minutes, your request will be forwarded to the Superior Court Master Calendar Coordinator to arrange an appropriate date on the Master Calendar. Requests in writing are required to be submitted not less than five (5) Court Days prior to hearing. Additional notice is required for matters anticipated to exceed ten minutes.

PROOF OF SERVICE

COURT: U.S. BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CASE NAME: RESCAP

ACTION NO.: BANKRUPTCY NO. 12-12020-MG

I am employed in the County of San Francisco, California. I am over the age of 18 and not a party to the within action. On this date, I served the foregoing document(s) described as:

1. **RESPONSE IN OPPOSITION TO RESCAP BORROWER CLAIMS TRUST'S SEVENTY-FIFTH OMNIBUS OBJECTION TO CLAIMS**
2. **DECLARATION OF ALAN MOSS IN SUPPORT OF HIS RESPONSE IN OPPOSITION TO RESCAP BORROWER CLAIMS TRUST'S SEVENTY-FIFTH OMNIBUS OBJECTIONS TO CLAIMS**

on the party(ies) set out in said document by causing a true copy thereof to be:

- ☐ Telecopied via facsimile to the addressee's facsimile number listed below per CRC 2008(b).
- ☐ Telecopied via facsimile to the addressee's telephone number listed below, and thereafter mailed according to the procedures set forth immediately hereinbelow.
- ☒ By U.S. priority OVERNIGHTmail, by placing said document(s) in a sealed envelope with first class postage thereon fully prepaid, and then deposited in a U.S. Post Office.
- ☐ By U.S. mail, Return Receipt Requested, by placing said document(s) in a sealed envelope with appropriate postage thereon fully prepaid and then placed in the designated office area for outgoing mail.
- ☐ Delivered by hand to the person set forth below, or by handing said document in a sealed envelope to a messenger service for delivery as addressed.
- ☐ Sent via Priority overnight mailing, by handing said document in a sealed envelope to an agent for the USPS for overnight delivery.

and if mailed, addressed as follows and sent to the following address(es):

Hon. Martin Glenn(Chambers Copy)
Judge of the U.S. Bankruptcy Court in and for the
Southern District of New York
Alexander Hamilton Custom House
One Bowling Green
New York New York 10004-1408

1 Clerk's Office(Filing Copy)
2 U.S. Bankruptcy Court in and for the
3 Southern District of New York
4 Alexander Hamilton Custom House
5 One Bowling Green
6 New York New York 10004-1408
7

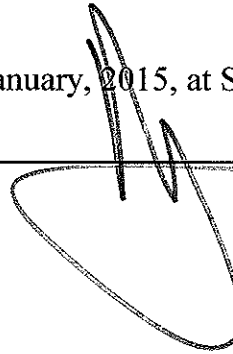
8 Morrison and Foerster LLP
9 ATTN: Norman S. Rosenbaum
10 250 West 55th Street
11 New York New York 10019
12

13 ResCap Borrowers Trust
14 Polsinelli PC
15 ATTN: Daniel J. Flanigan
16 900 Third Avenue, 21st Floor
17 New York New York 10022
18

19 Office of the U.S. Trustee for the
20 Southern District of New York
21 ATTN: Linda A. Rifkin & Brian S. Masumoto
22 U.S. Federal Office Building
23 201 Varick Street, Suite 1006
24 New York New York 10014
25

26 I declare under penalty of perjury under the laws of the State of California that
the foregoing is true and correct.

Executed this 22nd day of January, 2015, at San Francisco, California.

A handwritten signature in black ink, appearing to be "Alan Moss", is written over a horizontal line. The signature is stylized with a large loop at the end.